No. 77-174

In the Supreme Court of the United States

OCTOBER TERM, 1977

ROBERT B. MACHEN, PETITIONER

v.

JAMES H. PATTERSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE RESPONDENT

Petitioner, an officer in the United States Army, seeks review of the court of appeals' affirmance of the dismissal of two different libel actions that he brought against respondent, his immediate supervisor.

1. The facts of both cases are set forth in the district court's opinions (Pet. Apps. B and C 4-16). Difficulties arose between the petitioner, a Lieutenant Colonel, and his supervisor, respondent Colonel (now General) Patterson, over petitioner's work at the Systems Review and Analysis Office, Office of the Deputy Chief of Staff, Department of the Army. As a result, petitioner requested a transfer and respondent recommended that the petitioner be transferred. Nothing was done about the requests.

Petitioner then sent a written request for transfer to Lieutenant General Cooksey, the highest ranking officer at the Systems Review and Analysis Office. Petitioner enclosed with his request numerous memoranda and affidavits concerning the respondent and others. General Cooksey showed the materials to respondent's immediate supervisor, Richard J. Trainor, and asked him to investigate the matter. Trainor discussed the request and related documents with respondent and solicited his comments. Respondent suggested that he could best comply with the request by writing a memorandum assessing the petitioner's allegations and performance of duty. Respondent submitted his memorandum for General Cooksey to Trainor.

Petitioner instituted a suit against respondent (Civil Action No. 75-857-A), claiming that statements in the memorandum were libelous. On respondent's motion for summary judgment, the district court ruled that respondent was acting within the scope of his duties in making his statements and, relying on *Barr* v. *Matteo*, 360 U.S. 564, held that respondent therefore had absolute immunity from the libel suit (Pet. App. 4-8). Accordingly, the district court dismissed the complaint (Pet. App. 8).

In a second law suit (Civil No. 76-345-A), petitioner again alleged that respondent had libeled him, this time by providing a copy of petitioner's army officer evaluation report to the member of the Judge Advocate General's Office who was assisting the United States Attorney's Office in respondent's defense of the first suit. The district court granted respondent's motion to dismiss or, alternatively, for summary judgment, holding that the report "must be accorded the absolute privilege applied to communications between attorney and client and to documents given by the client to his counsel for use as an exhibit in judicial proceedings" (Pet. App. 16).

The cases were consolidated on appeal and the court of appeals affirmed for the reasons the district court gave. The court of appeals stated that "[a] review of the record and of the district court's two opinions discloses that the appeal * * * is without merit" (Pet. App. 1-2).

2. The dismissal of the two libel actions was correct.

a. With respect to the first libel action, which arose out of respondent's appraisal of petitioner's performance and the subsequent reporting of that appraisal to his superiors, the lower courts correctly held that respondent has absolute immunity. *Barr* v. *Matteo, supra*. Respondent's actions were well within the scope of his duty[1] and involved "an appropriate exercise of * * * discretion."

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[1]Petitioner contends (Pet. 18-27) that summary judgment was improper on the question whether respondent was acting within the scope of his authority when he prepared his memorandum. On this point, the district court correctly found (Pet. App. 7-8) that

> [Respondent] was the chief of the Combat Group—The plaintiff was an analyst under his supervision—Mr. Trainor says that the December 11th memorandum was written at his request—Both Mr. Trainor and Lt. General Cooksey say [respondent] was acting within the scope of his official duties as immediate supervisor of the plaintiff.
>
> * * * * *
>
> The Lt. General had a right to get the facts in re the plaintiff's request for a transfer—Mr. Trainor had a right to discuss the matter with the plaintiff's immediate supervisor—and [respondent] had the duty of replying.

Petitioner's argument is based on his objection to the use of the affidavits of General Cooksey and Trainor. Contrary to petitioner's assertions, however, each of the affiants swore to information within his personal knowledge. Trainor was respondent's immediate supervisor and General Cooksey was Trainor's immediate superior. Each had personal knowledge of respondent's duties and responsibilities. The affidavits thus constitute sufficient evidence that respondent acted within the scope of his authority.

Barr v. *Matteo, supra*, 360 U.S. at 575. Under these circumstances, the established federal rule is that respondent has absolute immunity from a suit for damages arising from such activity. *Ibid.*;[2] see *Howard* v. *Lyons*, 360 U.S. 593, 597-598.

The Court, however, has granted the petition for a writ of certiorari in *Butz* v. *Economou*, certiorari granted, 429 U.S. 1089, which presents related questions concerning the immunity of federal government officials from damage suits based upon acts done as part of their official duties.[3] In *Economou* the Second Circuit held that such officials have only a qualified, not an absolute, immunity.

Economou, where the claim for damages was based upon the initiation, conduct, and decision of administrative enforcement proceedings, presents the immunity issue in a different context than this case. Nevertheless, in *Economou* the court of appeals questioned the continuing validity of *Barr*. The Court therefore may deem it appropriate to hold this petition pending its disposition of *Economou*. But see *Martinez* v. *Schrock*, 537 F. 2d 765

[2]Notwithstanding subsequent decisions of this Court concerning the immunity available to state officials sued under 42 U.S.C. 1983, *e.g.*, *Scheuer* v. *Rhodes*, 416 U.S. 232, and *Wood* v. *Strickland*, 420 U.S. 308, *Barr* v. *Matteo, supra*, at least stands for the rule that federal government officials charged with alleged libel during their performance of duties are protected from damage suits by absolute immunity. See *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution*, C.A.D.C., No. 74-1899, decided September 16, 1977 (*en banc*). That principle is fully applicable to the case here.

[3]Petitioner is being furnished with a copy of petitioners' brief in *Economou*.

(C.A. 3), certiorari denied, 430 U.S. 920; *Conley* v. *Sawyer, et al.*, 538 F. 2d 323 (C.A. 4), certiorari denied, 429 U.S. 999, 1000.[4]

b. With respect to the second libel action, which arose out of respondent's delivery to his attorney of an evaluation report of petitioner that he had made, the courts below correctly held that the communication was privileged. As the district court explained (Pet. App. 10-12), attorneys assisting respondent in the defense of petitioner's first libel suit against him asked him for copies of all documents that might be relevant, and in response respondent gave them the evaluation report. Such communications between a client and his attorney, relating to actual or intended litigation, are protected under the traditional common law rule of privilege. See Prosser, *Law of Torts*, § 114, pp. 780-781, and § 115, p. 787 (4th ed. 1971); Fleming, *The Law of Torts* 528-530 (3d ed. 1965); 50 Am. Jur. 2d, Libel and Slander, § 212, pp. 723-724.[5]

Petitioner also argues (Pet. 32-36) with respect to the second libel action that respondent possessed the officer evaluation report in violation of Army regulations

[4]The petitions in both *Martinez* and *Conley* raised questions concerning the applicability of absolute immunity, the question in the latter case arising, like the case here, in the context of libel claims. The Court denied the petitions in those cases despite similar suggestions by the government that the issues raised might be interrelated with those raised in *Economou*. There appears to be no reason for treating this case differently.

[5]Petitioner discovered that respondent had delivered the report to his attorney during a court-ordered inspection and exchange of exhibits prior to trial in the first libel case (Pet. App. 9, 14). As the district court ruled (Pet. App. 15-16), this discovery, if considered a separate publication of the report, occurred in the course of a judicial proceeding and thus is covered by the privilege for statements made in that context.

and disclosed it to his attorney in violation of the Privacy Act. The district court did not decide these issues (Pet. App. 14) since, even assuming *arguendo* the correctness of petitioner's charges, they are irrelevant to his libel claim.

As the district court pointed out (Pet. App. 12), "[v]iolation of army regulations subjects the offender to such punishment as a court-martial may direct. 10 U.S.C. § 892, Art. 92. The court has no jurisdiction to hear and determine such matters." If petitioner has any remedy in federal court for the allegedly unlawful disclosure of the report, it is under the Privacy Act (5 U.S.C. (Supp. V) 552a(g)). But petitioner has not pursued that remedy (see Pet. App. 13). Accordingly, the questions concerning alleged violation of Army regulations and the Privacy Act are not properly presented here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1977.

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